

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

UNITE-HERE! LOCAL 11
(WHB Biltmore LLC
d/b/a Millennium Biltmore Hotel)

and

Case 21–CB–14893

JULIO SEGURA, An Individual

Daniel Adlong, Esq. Los Angeles, California
for the General Counsel.

Kristin Martin, Esq. (Davis, Cowell & Bowe, LLP)
San Francisco, California, for the Respondent

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California on August 17, 2010, based on the charge filed on February 8, 2010, alleging UNITE HERE! Local 11 (Respondent) violated Section 8(b)(1)(A) of the Act by threatening employees because of their protected concerted activities, the amended charge was filed on April 30, 2010 and the Complaint (Complaint) and Notice of Hearing issued on May 27, 2010, by the Regional Director for Region 21.

The Complaint alleges that UNITE HERE! Local 11 (Respondent) violated Section 8(b)(1)(A) of the Act by coercing unit employees in the exercise of their Section 7 rights by telling employees they would lose benefits if they continued to circulate a petition against changes in the health plan and by interrogating unit employees about the petition protesting the changes in the health plan.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

FINDINGS OF FACT

Upon the entire record herein, including the briefs from the General Counsel and Respondent, I make the following findings of fact.

I. JURISDICTION

WHB Biltmore, LLC d/b/a Millennium Biltmore Hotel (Employer), a Delaware corporation, with an office and place of business in Los Angeles, California, and engaged in the hotel business, during the 12-month period ending March 17, 2010, derived gross revenues in excess

of \$500,000 and purchased and received at its Los Angeles, California facility goods valued in excess of \$50,000 directly from points outside the State of California.

Based on the above, the Employer has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

Respondent admitted in its answer and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Threats and Interrogations

1. The Facts

This case involves an internal union dispute concerning changes that were made in an employee health care plan which effected employees represented by Respondent at the Biltmore Hotel in downtown Los Angeles. On about December 27, 2009,¹ The Los Angeles Hotel-Restaurant Employer-Union Welfare Fund notified employees covered under Respondent's negotiated health benefits that there were benefit changes in certain of the health plans.

As a result of their displeasure with the changes in the health care plans, employees Julio Segura (Segura), Cruz Macias (Macias), and Manuel Zeremeno (Zeremeno) circulated a petition in January 2010 protesting the changes.² The petition was mailed to Tom Walsh (Walsh), Respondent's president, on February 6, 2010 and received by Respondent on about February 8, 2010.³ Nothing in the petition identified Segura, Macias, or Zeremeno as the organizers of the petition. Their signatures were three of about 150 signatures on the petitions. Segura, meanwhile, filed the charge with Region 21 in the instant case on February 8, 2010, alleging Respondent violated Section 8(b)(1)(A) of the Act by threatening employees because of their protected concerted activities.

On February 11, 2010, Respondent's senior lead organizer, Manuel Roman (Roman), Respondent's lead organizer, Oscar Salazar (Salazar)⁴, and Respondent's organizer, Jeffrey Agerkop (Agerkop) went to the Biltmore Hotel to find out what the employees' concerns were regarding the health care plan. Respondent's three organizers went to the hotel employees' entrance and began speaking with employees about the health plan changes. There is a considerable difference between the Respondent's witnesses and General Counsel's witnesses as to the substance of the conversations that took place on February 11, 2010 at the hotel.

¹ R. Exh. 1.

² GC Exhs. 3 and 4.

³ GC Exhs. 5 and 6.

⁴ Respondent stipulated that Roman and Salazar were its agents within the meaning of the Act.

a. Julio Segura

Segura was employed by the Biltmore Hotel and was a member of Respondent. Segura served on Respondent's organizing committee to assist in recruiting employees to become members of Respondent. Segura was also a member of the committee at the Biltmore Hotel that Respondent organized to deal with the health care plans' shortfalls. The Health Care Trust had advised Respondent that the extant employer contributions to the trust under the provisions of the collective bargaining agreement were insufficient to cover the costs of the health and welfare plans. There either had to be increased employer contributions or reduced benefits. Since the employers refused to increase contributions, the employee committees, including the one at the Biltmore Hotel of which Segura was a member, were organized to come up with a solution.

According to Segura, on February 12, 2010, Roman, Salazar and Agerkop spoke with him in Spanish at his work station at about 10:30 a.m. Salazar told Segura he wanted him to meet Roman and that he wanted to talk to Segura. Salazar said, "Julio, how come you are gathering signatures to put us against the union?" Segura admitted on cross examination that Roman said that Segura was misinforming people. Roman then yelled at Segura and said, "What you're doing is illegal, all these signatures don't indicate what this is for and that I'm going to show you how things are done." Segura said there was no need to scream and this ended the conversation.

b. Cruz Macias

Macias is a banquet server at the Biltmore Hotel and a member of Respondent.

On February 11, 2010, at about 10:15 a.m. Macias met with Roman, Salazar and Agerkop outside the employees' entrance at the Biltmore Hotel. Macias is fluent in both English and Spanish. Roman approached Macias and gave him his business card. Roman asked Macias his name and Macias told him. Roman then said, "You're the person I would like to speak to." Macias said he did not have time then because he had to go into work. A short time later in the employees' locker room, Roman, Salazar and Agerkop approached Macias and Roman asked why Macias had signed the petition. Macias said he did not agree with the decisions they were making on the benefit plan. Roman asked Macias if he had written the petition and Macias replied that he had. Roman called Macias a liar and that he had lied to the employees, saying, "You told them that they were going to raise the dues to \$80 instead of \$47." Macias left the locker room and went to work in the banquet room.

In the kitchen near the ballroom Macias again saw Roman, Salazar, and Agerkop with a few employees. Roman said to Macias, "You're a liar, you lied to the people." Roman added, "If you guys continue with this petition, all you guys are going to do is end up losing your benefits."

c. Jeffrey Agerkop

Agerkop was unable to remember the day or month that he Roman, Salazar, and Biltmore Hotel shop steward Agostin Herrera (Herrera) went to the Biltmore Hotel together to talk to employees about the health benefits petition. The four went to the Biltmore after a regularly held Thursday morning union stewards' meeting that ended at noon. Agerkop said they met employees at the employees' entrance to the hotel. Agerkop is somewhat fluent in Spanish. The four union representatives asked employees if they knew what they had signed on that petition and tried to explain the changes in the health benefits plan. Agerkop saw

Roman talking with Macias and Macias had raised his voice and said something about suing the Union. Later Agerkop, Roman, and Salazar encountered Macias again in the banquet hall service area. The union agents were speaking to employees about changes in the health plan. Macias complained to Roman about the illegality of the changes to the health plan.

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Agerkop said that he, Roman, and Salazar spoke to Segura around 1 p.m. at his work station,. Roman asked Segura why he was passing this petition around. Agerkop in a very vague and nonspecific manner said they asked Segura what he was telling people about the petition. Agerkop denied Roman got angry or yelled at Segura. Agerkop denied that Roman told Segura they were going to “show you how it’s done.” Agerkop also denied that Respondent’s agents told Macias that employees would lose their benefits if they signed or circulated the petitions. Agerkop denied being in the employees’ locker room that day.

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d. Oscar Salazar

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Salazar recalled going to the Biltmore Hotel on the second Thursday in February 2010, at about 1 p.m. with Roman, Agerkop, and Herrera to tell employees about the health and welfare changes. Salazar speaks both Spanish and English. Salazar overheard Macias near the employees’ entrance to the hotel speaking with Roman. Macias said, “. . . [W]e work for them and we don’t have the right to make changes on our health and welfare plan.” Macias added, “. . . we would not see who was going to win at the end because he would not sue us because basically we work for him.” Macias’ voice was raised during this exchange. Salazar said he did not see Macias in the employees’ locker room. Later Salazar encountered Macias in the ballroom service area while speaking with employees about changes presumably to the health plans. Macias came into the area and said the Union agents were not supposed to be there and got within inches of Roman’s face. Salazar denied telling any employees in the service area that if they circulated a petition they would lose their benefits.

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Salazar said that on another unspecified date he, Roman, and Agerkop spoke to Segura at his work station and asked if he understood the changes in the health plan and since he was one of the most informed employees at the hotel about the changes, he should inform employees how the changes came about. Union dues increases were mentioned and Segura said he did not understand the increase.

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e. Manuel Roman

After the shop steward’s meeting on February 11, 2010, Roman, Salazar Agerkop and Herrera went to the Biltmore Hotel to find out what employees’ concerns were as a result of the petition. Roman and the other union agents spoke to employees about the health care changes near the employees’ entrance. Roman is fluent in both Spanish and English. While Roman was having a conversation with an employee, Macias said, “Yeah, I’m not in favor of that.” Roman introduced himself to Macias and said let’s talk. Macias became agitated and said, “What we were doing was illegal, that we had no right to make these changes.” When Roman tried to explain how the health fund worked and why the change to the health plan had to be made, Macias said he did not want to hear any of that and said, “what you guys did was illegal, and by the way you work for me.” Macias said something to the effect of “we’ll see who wins in the end.” Macias also said he was going to sue the Union.

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Later Roman encountered Macias in the employees’ lockerroom. Macias was talking with other employees and Roman tried to explain the reason for the changes to the health plan. A little while later Roman again had contact with Macias in the service area of the ballroom. Roman was talking with employees when Macias came up and told Roman he should get out

and that Roman had no right to be there. Roman denied saying that if employees continued to circulate the petition they would lose their benefits. Roman said that the health fund had more money going out than coming in and if changes were not made, the fund would go broke and that would affect employees' benefits.

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Roman said that on another unspecified date he, Salazar, and Agerkop spoke to Segura at this workstation. Roman told Segura, "it's not bad for you to be passing around the petition, it's just that explain to folks why these changes had to be made." Roman denied telling Segura it was illegal to pass out the petition. Roman admitted he asked Segura why he was gathering signatures on a petition.

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2. Analysis

a. Credibility

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The context in which the Respondent's representatives visited the Biltmore Hotel on February 11, 2010, is significant. There is no dispute that the Los Angeles Hotel-Restaurant Employer-Union Welfare Fund had indicated there was a crisis in the funding of employee health plans and that Respondent dealt with this crisis by forming employee committees to resolve the funding issue. Further, prior to February 11, 2010, the health care issue had been resolved. After receiving the petition dealing with health care changes and the unfair labor practice charge filed by Segura, Roman was told by Biltmore Shop Steward Herrera that he signed the petition to avoid union dues being raised. Respondent had at no time considered a dues increase. Clearly there was confusion by the Biltmore employees about the issue of health care benefits and union dues, justifying Respondent's representatives clarifying these issues with their members at the Biltmore Hotel.

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In assessing the credibility of Segura and Macias, it is significant that there is no evidence of any threats or interrogation by Respondent prior to February 11, 2010. Yet the charge filed on February 8, 2010, alleges threats by Respondent. That the charge was filed before any of the alleged incidents, suggests fabrication. Moreover there was no corroboration of any of the alleged threats or interrogations, other than those admitted by Respondent's witnesses, despite evidence that there were many employees present during the alleged threats and interrogations. On other hand Respondent's agents' testimony was consistent and corroborative of each other. Respondent's alleged threats that employees would lose benefits if they continued with the petition, is illogical. First, the changes to the health care benefits were a fait accompli. Second, the petition was already completed as it had been signed and mailed to Respondent. Third, Roman's admitted statements to employees that if changes to the health plan were not made, employees could lose benefits because fund would be bankrupt, is a more likely explanation of what was said about employees losing benefits.

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Likewise, the alleged interrogation of Macias by Roman about writing the petition is unlikely since there is no evidence Respondent knew Macias had any part in preparing or gathering signatures for the petition. In addition, Macias' recollection is suspect. He claims that the interrogation occurred on February 11, 2010 at 10:30 a.m. when the credible evidence indicates the conversation could not have occurred until afternoon. Respondent's witnesses testified consistently that the meeting with employees at the Biltmore Hotel occurred after a morning union steward meeting at the union hall that did not end until noon. Moreover, Segura and Macias demeanor at the hearing seemed quite hostile. Macias admitted his hostility toward Roman required intervention by another employee at the hotel.

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Accordingly, I do not credit the testimony of Macias that Roman asked Macias if he had written the petition. Rather, I credit Roman's testimony that while he was in the locker room he was merely explaining the health benefits changes to employees. Further, I do not credit Macias' testimony that Roman told him, "If you guys continue with this petition, all you guys are going to do is end up losing your benefits." Rather, I credit Roman that he said the health fund had more money going out than coming in and if changes weren't made the fund would go broke and that would affect employees' benefits. This was simply an explanation of what had transpired with the deficits to the health care fund.

On the other hand, since Segura's name appeared on the unfair labor practice charge, it is more likely that Respondent's representatives would have reason to single him out and ask him about the petition. Both Roman and Agerkop admitted asking Segura why he was involved with the petition, so it is likely that Salazar also inquired of Segura about the petition. Moreover, Salazar did not deny on February 11, 2010 asking Segura, "Julio, how come you are gathering signatures to put us against the union?" I credit Segura in this regard.

b. The Complaint allegations

Complaint paragraph 7(a) alleges that on about February 12, 2010, Roman coerced unit employees in the exercise of their Section 7 rights by telling employees they would lose their benefits if they continued to circulate a petition against the changes in the health plan.

Having failed to credit Macias' testimony, I find there is no credible evidence to support this allegation and recommend it be dismissed.

Complaint paragraph 7(b) alleges that on about February 12, 2010, Roman interrogated unit employees about a petition protesting the change to the health plan.

Roman and Agerkop both admitted asking Segura on February 11, 2010 why he was passing this petition around or why he was gathering signatures on a petition.

Complaint paragraph 8 alleges that on February 12, 2010, Salazar interrogated unit employees about the petition protesting the changes to the health plan.

The credible evidence indicates that on February 11, 2010 Salazar asked Segura, "Julio, how come you are gathering signatures to put us against the union?"

The law is well settled that interrogations by union representatives should be examined "in context in order to determine if under all the circumstances it would have a tendency to restrain and coerce employees within the meaning of Section 8(b)(1)(A) of the Act." *Letter Carriers Local 233 (Postal Service)*, 311 NLRB 641, 545 (1993); *American Postal Workers Union*, 328 NLRB 281, 282 (1999). In *American Postal Workers Union* the interrogation by the union representative was in the context of the union member's request for assistance in filing her grievance and an immediate inquiry into her membership in the Respondent Union. The Board, in finding the interrogation coercive, noted that the questions, "...could only suggest that the Respondent's future handling of Johnson's grievance may be affected by her lack of membership in the Respondent." *Id.* at 282.

Counsel for the General Counsel also cites *Peninsula Shipbuilders Assn.*, 237 NLRB 1501 (1978); *Aristocrats Inns of America*, 146 NLRB 1599 (1964); *Amalgamated Clothing & Textile Workers, Local 990*, 174 NLRB 1148, fn. 1 (1969); and *Service Employees Local 399 (City of Hope)*, 333 NLRB 1399 (2001) for the proposition that various interrogations by union

agents violated Section 8(b)(1)(A) of the Act. In each of these cases, the union agents accompanied their interrogations by threats of job loss, suggestions that the union's processing of a grievance was dependent upon the member answering their questions, and by the presence of the employer during the questioning.

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Respondent argues that the questions asked of Segura by the Union's representatives were not coercive but were permitted inquiries. Respondent cites *Randell Warehouse of Arizona*, 347 NLRB 591, 595 (2006), where

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The Board has held that it is not objectionable conduct for a union to solicit employees noncoercively to support it and to maintain a written record of how employees respond.

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Direct personal solicitation and polling are the primary means by which unions effectuate the policies of the Act by affording employees the right to "self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."

See also *Fessler & Bowman, Inc.*, 341 NLRB 932, 934 (2004).

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In *Springfield Hospital*, 281 NLRB 643, 692–693 (1986), where the union asked employees whether they were for or against union and recorded responses, the administrative law judge found:

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Here, the Employer has not shown that either the questioning of employees by prounion employees or by the Union's agents or the Union's use of charts to record the employees' sentiments or the discussion of individual employees' sentiments at union meetings occurred in a context of threats of reprisal or other coercive conduct attributable to the Union or to its supporters .

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In *Graham Engineering*, 164 NLRB 679, 695 (1967), the union questioned an employee concerning his support of a rival union. The Board affirmed the administrative law judge who found the questioning coercive where the interrogation occurred against the background of the union's threat at a union meeting of reprisals against adherents of District 50.

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Likewise in *Retail Clerks Locals 698 and 298 (Skorman's, Inc.)*, 160 NLRB 709, 710 (1966), in the context of ongoing surveillance by the union, questioning employees about their de-authorization activities and threatening to keep them under surveillance, the Board found the union violated Section 8 (b) (1) (A) of the Act.

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Finally in *Stokely-Bordo*, 130 NLRB 869, 873 (1961), employees who were summoned individually to the plant office where they were interrogated by Thomas, the vice president of the Chemical Workers International, in the presence of other union representatives and employer officials were found to have been coerced and the Board found that the union violated Section 8 (b) (1) (A) of the Act by interrogating employees about their participation in circulating a petition protesting representation by the Chemical Workers.

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In each case where the Board has found the union's interrogation coercive and violative of Section 8(b)(1)(A) of the Act, there has been additional conduct by the union that made the interrogation coercive. Thus the union has questioned employees in the presence of the employer, the union has threatened to withhold representation in the grievance procedure, the union has threatened surveillance, the union has threatened employees with unspecified reprisals or the union has threatened employees with loss of jobs.

Such examples of coercion are absent in the instant case. I have found that Respondent did not threaten Macias or other employees with loss of benefits if they continued to circulate the petition. Respondent's interrogation of Segura occurred in the context of confusion about whether the petition involved increased union dues or changes in the health plan. Certainly the Union, in its duty of representation to members at the Biltmore Hotel, had a legitimate interest in finding out why the employees were unhappy and what changes they were unhappy about. Asking the person who filed the unfair labor practice charges and who prepared the petition why he had circulated the petition, in the absence of any evidence of coercive conduct by Respondent, did not violate Section 8(b)(1)(A) of the Act. I will recommend that the complaint allegations 7(b) and 8 be dismissed.

Conclusions of Law

1. WHB Biltmore, LLC d/b/a Millennium Biltmore Hotel is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(b)(1)(A) of the Act and the Complaint is dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁵

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

John J. McCarrick
Administrative Law Judge

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.